

**PRIVATELY OWNED MARINA
CONSTRUCTION LOAN AGREEMENT**

Sample

TABLE OF CONTENTS

ARTICLE 1 – PROMISE TO PAY 3

ARTICLE 2 - DEFINITIONS 3

ARTICLE 3 – BORROWER COVENANTS..... 4

ARTICLE 4 - TERM OF AGREEMENT 5

ARTICLE 5 - DISBURSEMENT OF LOAN 5

ARTICLE 6 - CONSTRUCTION OF PROJECT..... 7

ARTICLE 7 - LOAN REPAYMENT 9

ARTICLE 8 –DEPARTMENT’S REMEDIES ON DEFAULT..... 11

ARTICLE 9 - RIGHT OF THE DEPARTMENT TO TAKE POSSESSION OF THE
PROJECT AREA..... 11

ARTICLE 10 - RIGHT OF ENTRY BY THE DEPARTMENT 11

ARTICLE 11 - LAND CONTROL..... 12

ARTICLE 12 - OPERATION OF PROJECT 12

ARTICLE 13 - LIABILITY AND FIRE INSURANCE..... 14

ARTICLE 14 - INSTALLATION OF OTHER FACILITIES..... 15

ARTICLE 15 - SIGN REFERRING TO DEPARTMENT FINANCING 15

ARTICLE 16 - DIRECTIONAL SIGNS 15

ARTICLE 17 - WAIVER OF RIGHTS..... 16

ARTICLE 18 – NOTICES..... 16

ARTICLE 19 - REMEDIES NOT EXCLUSIVE 17

ARTICLE 20 - OPINIONS AND DETERMINATIONS..... 17

ARTICLE 21 - SUCCESSORS AND ASSIGNS OBLIGATED 17

ARTICLE 22 - ASSIGNMENT 17

**PRIVATELY OWNED MARINA
CONSTRUCTION LOAN AGREEMENT**

TABLE OF CONTENTS

ARTICLE 23 - LIABILITY..... 17

ARTICLE 24 - PRIOR TERMINATION 18

ARTICLE 25 – APPROVAL..... 18

ARTICLE 26 - AUDIT 18

ARTICLE 27 – RECYCLING CERTIFICATION..... 18

ARTICLE 28 – CERTIFICATION CLAUSES 18

ARTICLE 29 - CHILD SUPPORT COMPLIANCE ACT 19

ARTICLE 30 - UNENFORCEABLE PROVISION 19

ARTICLE 31- UNION ORGANIZING 19

ARTICLE 1 – PROMISE TO PAY

- A) The Department shall lend construction funds, as set forth below, to the Borrower for the construction of the Project described in Exhibit B (attached). Such funds shall not exceed the amount listed on line 3 of the Standard Agreement (STD 213) to which this Exhibit is attached
- B) For value received, the Borrower promises to repay the sum of principal disbursed pursuant to this Agreement together with interest on that amount at the rate set forth below and any applicable penalties until fully repaid.

ARTICLE 2 - DEFINITIONS

- A) “Account”: A dual-signature checking account established by the Borrower for receipt and disbursement of Loan advances. Such account shall require one signature from a Department representative and one signature from a Borrower representative to disburse funds (see Article 5 – Disbursement of Loan).
- B) “Borrower”: The Borrower documented in the STD 213 and Exhibit B.
- C) “CEQA”: The California Environmental Quality Act
- D) “Collateral”: Property, both real and personal, whether tangible or not, pledged as security for repayment of the Loan.
- E) “Commission”: The Boating and Waterways Commission.
- F) “Date of Acceptance of the Project”: The date specified on the Project Completion Certification.
- G) “Default”:
 - 1) The failure of the Borrower to make any payment required by this Agreement within Thirty (30) days of the due date of the payment.
 - 2) The failure of the Borrower to comply with any other requirement of this Agreement within Ten (10) days of receipt of written notice from the Department specifying such failure.
 - 3) The provision of false representations or false warranties by the Borrower in response to any obligations under this Agreement.
 - 4) The failure of Borrower to conduct appropriate proceedings in good faith to contest any levy or proceeding against the Collateral or Borrower’s interest therein; or
 - 5) The filing of a petition by the Borrower under the provisions of the Bankruptcy Code, or the failure of the Borrower to conduct appropriate proceedings in good faith to contest a bankruptcy filing by a third party when such action affects the collateral.

- H) “Department”: The Department of Boating and Waterways.
- I) “Gross Revenues”: The inflows of revenues, before expenses are subtracted, received by the Borrower for services, facilities and leaseholds provided or located within the Project Area, documented in TABLE 1 of Exhibit B.
- J) “Loan”: A loan, in conjunction with this Agreement, of funds from the Department to the Borrower for construction of the Project.
- K) “Project”: The construction, improvement, or rehabilitation of a marina and/or boating-related facilities described in Exhibit B.
- L) “Project Area”: The real property, and improvements thereto, identified in Exhibit B, within which the Project will be undertaken.
- M) “Project Completion Certification”: A fully executed Notice of Completion, or equivalent, which states the Borrower has accepted the Project as complete on a specific date.
- N) “Project Costs”: Contract, equipment (not including the purchase of tools), labor, material and construction costs that are incurred by the Borrower for the purpose of completing the Project excluding indirect or overhead charges incurred by the Borrower for its own personnel.
- O) “Reserve Fund”: A separate and independent fund for the exclusive purpose of providing extraordinary, non-routine maintenance, repair or replacement during the term of this Agreement.
- P) “Unpaid Balance”: Total outstanding debt, including principal, accumulated interest and unpaid penalties.

ARTICLE 3 – BORROWER COVENANTS

- A) The Borrower certifies that the Borrower has title to, or adequate interests in, the Project Area. Adequate interests include, but are not limited to, the following:
 - 1) Access to the Project Area by a maintained public way,
 - 2) A right of passage over a waterway, open to the public, between the Project Area and navigable waters, and
 - 3) Easements or other rights of way outside the Project Area sufficient to provide utilities and services to the Project.
- B) The Borrower agrees to incur no additional indebtedness having greater priority than the Loan in payment of principal or interest or pledge of revenues involving the Project Area.
- C) The Borrower warrants that there is no encumbrance, lien, easement, license, title, cloud or other interest that may interfere with the Project Area or use thereof by the public.

- D) Until the Loan is fully repaid, Borrower agrees to:
- 1) Pay all taxes, assessments and other charges, fines and impositions attributable to the Project Area and leasehold payments or ground rents, if any, by Borrower making payment, when due, directly to the payee thereof. Borrower shall promptly furnish to Department all notices of amounts due under this paragraph, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Department receipts evidencing such payments. Borrower shall pay when due all encumbrances, charges, and liens, on the Project Area or any portion thereof and payments on notes or other obligations secured by an interest in the Project Area or any portion thereof, with interest in accordance with the terms thereof. Borrower shall have the right to contest in good faith any claim or lien, or payment due thereunder, provided that Borrower does so diligently and without prejudice to Department,
 - 2) Carry adequate insurance to protect Department in the event of damage or destruction of the Project Area, and
 - 3) Not remove or demolish any buildings or other improvements within the Project Area without the written approval of the Department.
- E) By signing this Agreement, Borrower certifies that Borrower has read, understands and agrees to all terms and provisions of this Agreement.

ARTICLE 4 - TERM OF AGREEMENT

- C) This Agreement shall remain in full force and effect until the Borrower repays the Unpaid Balance in full, or this Agreement is otherwise terminated.
- D) This Agreement may be extended, amended or cancelled upon the written agreement of the parties.

ARTICLE 5 - DISBURSEMENT OF LOAN

- A) The Borrower shall make the last request for the disbursement of loan funds from Department no later than **LAST PAY DATE**.
- B) The Department shall have no obligation to disburse any of the Loan if it deems such action to be in the best interest of the State.
- C) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates to the satisfaction of the Department that the Borrower has title to, or adequate interests in, the real property comprising the Project Area.

- D) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates that it has acquired all permits necessary to construct and operate the Project. Copies of such permits shall be delivered to the Department.
- E) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates that it has satisfactorily complied with CEQA for the Project.
- F) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower has fully executed all required security agreements; such security agreements are recorded if necessary; and original or conformed copies of such recorded documents are received by the Department.
- G) Loan disbursements may be made either (1) in advance of Project work or (2) after the occurrence of work (in arrears).
 - 1) Loan disbursements in advance of Project work shall be subject to the following conditions:
 - (a) Borrower must prove to Department's satisfaction that hardship circumstances warrant advance Loan disbursements.
 - (b) The Borrower may request a Loan advance from the Department to cover those Project Costs expected to occur in the succeeding Thirty (30) day period.
 - (c) Requests for Loan disbursements may not be made more than once every Ninety (90) days.
 - (d) All disbursed Loan funds shall be deposited in the Account, which shall reflect all receipts and expenditures of Loan funds.
 - (e) The Borrower must request Loan disbursement in writing. Invoices or other evidence of Project Costs must accompany requests.
 - (f) The Department shall withhold from Loan disbursements an amount equal to Ten Percent (10%) of each disbursement until the Department has accepted the Project as complete, approved all Project Costs, and all mechanic's liens have been released. Prior to disbursement of withheld funds, the Borrower shall provide the following to the Department:
 - (i) A Project Completion Certificate (or equivalent)
 - (ii) An accounting of all Loan funds
 - (g) All Loan funds disbursed by the Department to the Borrower shall remain under the control of the Department until the Department approves such funds for expenditure.

- (h) The Borrower shall request Department approval of the final expenditure of disbursed Loan funds no later than Thirty (30) days following the Department's acceptance of the Project as completed.
 - (i) The Borrower shall return to the Department any Loan funds including interest remaining in the Account after all Project Costs have been paid. Such Loan funds shall be:
 - (i) Returned to the Department no later than Sixty (60) days following Date of Acceptance of the Project by the Borrower, and
 - (ii) Applied to the reduction of the Loan.
- 2) Loan disbursements made in arrears shall be made as follows:
- (a) The Borrower may request a Loan payment in arrears not more than once every Thirty (30) days; such requests must be accompanied by paid invoices or other evidence of Borrower's payment of Project Costs.
 - (b) The Department shall withhold from Loan disbursements an amount equal to Ten Percent (10%) of each disbursement until the Department has accepted the Project as complete, approved all Project Costs, and all mechanic's liens have been released. Prior to disbursement of withheld funds, the Borrower shall provide the following to the Department:
 - (i) A Project Completion Certificate (or equivalent)
 - (ii) An accounting of all Loan funds.
- H) The Department may withhold any Loan disbursement if the Borrower fails to comply with any of the provisions of this Agreement.
- I) The Department may at any time require the Borrower to provide proof of the amounts of expenditures made under the Agreement. Proof of expenditure shall consist of invoices or other such evidence of Project Costs.

ARTICLE 6 - CONSTRUCTION OF PROJECT

- A) The Borrower shall complete the Project no later than Two (2) years following the effective date of this Agreement.
- B) The Borrower shall, within Sixty (60) days of approval of this Agreement, provide the Department with a project schedule showing the proposed dates (beginning and ending dates) of the Project phases, including but not limited to: Project construction; construction milestones; acceptance of Project by the Borrower; and submission of a Project Completion Certificate to the Department.

- 1) Borrower shall make every effort to complete the Project in a continuous and expeditious manner.
- C) The Borrower shall meet the minimum requirements of all applicable city, county and state construction codes, safety codes and regulations.
- D) The Borrower shall obtain from the Department advance written approval of all construction change orders of \$5,000 or more.
- E) All architectural engineering contracts for plans and specifications shall require that the plans and specification:
 - 1) Be prepared by persons licensed by the State of California to undertake the type of design required by the Project (engineer's/architect's certificate number to appear on construction contract design documents),
 - 2) Be submitted to the Department and Borrower on CD or DVD; all drawings shall be in one of the following electronic file extensions: .DWG or DXF, and specifications shall be submitted in MS Word or WordPerfect format,
 - 3) Become the property of the Borrower,
 - 4) Provide for all Project facilities set forth in Exhibit B, and
 - 5) Provide for shoreside facilities for removing waste from vessel holding tanks in accordance with the Harbors and Navigation Code section 654.1 and Title 14, California Code of Regulations, section 5200.
- F) The Project shall be constructed in accordance with the plans and specifications, and any changes accepted by the Department.
- G) All construction contracts of the Project shall:
 - 1) Be awarded in accordance with all applicable laws and regulations,
 - 2) Contain the following clause: "Representatives of the Department of Boating and Waterways shall be allowed access to all parts of the construction work.",
 - 3) Contain a clause stating that the Contractor and its subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee who is employed in the work covered by such contracts or against any applicant for such employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age, marital status, and denial of family care leave, and that such provisions shall include, but not be limited to: employment, upgrading, promotion or transfer, recruitment, or recruitment advertising, layoff or termination,

- rates of pay or other forms of compensation, and selection for training including apprenticeship,
- 4) Contain a clause that the contractor shall comply with all air pollution and environmental control rules, regulation, ordinances and statutes which apply to the Project and any work performed pursuant to the construction agreement, and
 - 5) Contain a clause that requires the contractors to certify the structural integrity and safety of the Project.
- H) Prior to the commencement of the construction of the Project, the Borrower shall cause the contractor and a corporate surety acceptable to the Department to furnish in favor of the Borrower and the Department, as their interests may appear, bonds or other security interests as allowed pursuant to Public Contract Code sections 10263 and 22300 in the minimum amounts indicated below:
- 1) Faithful performance - One Hundred Percent (100%) of the total construction agreement bid price.
 - 2) Labor and materials - One Hundred Percent (100%) of the total construction agreement bid price.
- I) The Borrower shall provide, and Borrower's personnel and construction of the Project shall be under the supervision of, qualified inspectors for the supervision of construction. Inspection reports and related inspection data shall at all reasonable times be accessible to the Department personnel, and on request copies of such reports and data shall be provided to the Department by the Borrower.

ARTICLE 7 - LOAN REPAYMENT

- A) Interest compounds continuously on the Unpaid Balance of the Loan as follows:
- (a) This Loan is an adjustable rate loan capped at **PERCENT** (X.X percent) per annum.
 - (i) The interest rate shall adjust each year on January 1 to a rate equal to the Prime Rate (as published in the Wall Street Journal (WSJ) plus one percent on the immediately preceding December 1 or closest day thereafter). However, the rate charged shall not rise above the capped amount.
 - (ii) Interest begins compounding on the warrant date that funds are disbursed.

- B) Repayment of the Loan shall begin immediately following the first Loan disbursement as follows:
- 1) Interest-only payments shall be made beginning the month immediately following the first Loan draw and be made monthly, until drawdown is completed. However, upon written agreement between the Department and Borrower, Borrower may forego interest-only payments.
 - 2) Repayment of principal and interest shall:
 - (a) Begin the month immediately following the final draw, however, upon written agreement between the Department and Borrower, Borrower may defer repayment up to one year after final draw,
 - (b) Be made in consecutive and approximately equal monthly installments to be determined by the Department,
 - (c) Be completed no later than **LOANDUEDAT**
 - 3) All payments shall be due on the 1st of each month, and be considered delinquent if not received by the Department by the 15th of the month.
 - (a) The Department shall access a penalty equal to Five Percent (5%) of any delinquent payment; such penalty shall be added to the overdue payment.
 - (b) If payment is delinquent more than two times in any 12-month period, the interest rate shall immediately revert to the capped amount and remain there for the duration of the Loan.
- C) Repayment of the Loan shall be made from gross revenues originating from fees and rentals charged and received by the Borrower for services, facilities and leaseholds provided or located within the Project Area and any other resources of the Borrower; such gross revenues shall constitute partial security for Loan repayment.
- D) The Department shall annually make adjustments in the schedule of Loan payments to reflect any annual interest rate change and any unscheduled payments of principal or interest that have been received.
- E) The Borrower at its option may at any time make advance payment (without penalty) of all or part of the principal on the Unpaid Balance. Such advance payment shall not relieve the Borrower of making any regularly scheduled loan payment.
- F) In the event the Borrower fails, in whole or in part, to make any payment due under this Agreement, such deficiency shall be added to and become part of the Loan principal.
- G) If any Loan payment made by the Borrower is less than the amount required under this Agreement, then such payment shall first be applied to reduce any accrued unpaid

interest due on the Loan, and the balance, if any, shall be used to reduce the principal of the Loan. Such payment shall be treated as a delinquent payment and penalties shall be applied.

- H) In the event the Borrower sells or otherwise transfers the Project, the Loan shall become due and payable immediately upon the completion of the sale or transfer unless such a sale or transfer is to the heirs of the Borrower or is to a business that is controlled by the Borrower.

ARTICLE 8 –DEPARTMENT’S REMEDIES ON DEFAULT

Upon the occurrence of Default, the Department may:

- A) Exercise all rights and remedies accorded the Department in the security agreements signed by Borrower including, but not limited to, the right to take possession of the Project Area.
- B) Exercise all rights and remedies accorded to the Department by law, including, but not limited to, those rights established in the Harbors and Navigation Code.
- C) Declare the Loan (including, without limitation, all accrued interest) immediately due and payable without further demand or notice.

ARTICLE 9 - RIGHT OF THE DEPARTMENT TO TAKE POSSESSION OF THE PROJECT AREA

- A) The Department may take possession of the Project Area if the Borrower is in Default. The Department shall, after the exercise of such option, construct, operate or maintain the Project Area for the account of the Borrower until the Loan is repaid in full; the revenues received from the Project Area during such time shall be applied first to reduce the interest and second to reduce the principal of the Loan and then to cover any other expenses incurred in the operation of the Project Area.

ARTICLE 10 - RIGHT OF ENTRY BY THE DEPARTMENT

- A) The Department and its agents may, at any and all reasonable times during the term of this Agreement, enter the Project Area for purposes of inspecting the Project or as otherwise necessary for the Department to exercise its rights under this Agreement.
- B) Upon Default, acceleration under Article 8(C), or abandonment of the Project Area, the Department, in person, by agent or by judicially appointed receiver shall be entitled to enter upon, take possession of and manage the Project Area and to collect the rents of the Project Area including those past due. All rents collected by Department or the receiver shall be applied first to payment of the costs of management of the Project Area and collection of rents including, but not limited to, receiver's fees, premiums on

receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Agreement. Department and the receiver shall be liable to account only for those rents actually received. The provisions of this paragraph shall operate subject to the claims of senior lien holders.

ARTICLE 11 - LAND CONTROL

- A) The Borrower shall retain ownership of the Project Area and shall not sell, exchange, transfer, mortgage, or hypothecate in any manner all or any portion of the Project Area, or required therewith, without the advance written approval of the Department. Approval of any junior mortgage, hypothecation or encumbrance will not be unreasonably withheld by the Department.

ARTICLE 12 - OPERATION OF PROJECT

- A) The Borrower shall not charge unreasonable berthing rates for marina facilities within the Project Area. The Department shall monitor such rates to ensure that the Borrower's rates are not exorbitant; reasonableness will be determined by means of a survey of other marinas in the Project Area's market area.
- B) Project Area electrical systems that extend into or over water shall be inspected biennially, by a licensed electrical contractor or electrical engineer for compliance with the safety-related provisions of the California Electrical Code (Part 3 of Title 24 of the California Code of Regulations).
- C) The Borrower shall each year conduct a survey of berthing charges that prevail in the same market area as the Project Area and shall transmit the results of the survey to the Department by April 1 of the following calendar year.
- D) The Borrower shall:
- 1) Continuously operate in an efficient and economical manner all Project Area facilities constructed, improved, or completed, in full or in part, as a result of the Loan,
 - 2) Make all repairs, renewals and replacements necessary so that the Project Area at all times meets the minimum standard of maintenance set forth in the Department of Boating and Waterways Marina Maintenance Standards and Guidelines (Guidelines), as amended from time to time, which the Department shall provide and shall become a part of this Agreement as Exhibit C,
 - (a) Provide to the Department, within Sixty (60) days of approval by the Department of General Services of this Agreement and receipt of the Guidelines, a maintenance schedule for approval detailing how each objective of the

Guidelines will be addressed within the Project Area over the term of this Agreement. Each objective of the Guidelines must be considered; any objectives that are not applicable to a Borrower shall be included in the schedule with notation that such objective does not apply to this Project Area. The Department shall not unreasonably withhold its approval; however, it is the Borrower's responsibility to ensure that such maintenance schedule adequately addresses Borrower's responsibilities and each objective. The Department's written approval of the maintenance schedule shall be required before any funds are disbursed,

- 3) Follow its approved maintenance schedule throughout the term of this Agreement,
 - 4) Update its maintenance schedule outlined in the Guidelines. Borrower must receive the prior written approval of the Department for updates to its maintenance schedule,
 - 5) Make all Project Area facilities available to all on equal and reasonable terms,
 - 6) Make all Borrower's books, papers, records and accounts relative to the Project Area open and available for inspection and audit by the Department or any authorized representative of the Department during normal business hours, and
 - 7) Periodically fix, prescribe, and collect fees, rentals, or other charges for services and use of facilities within the Project Area sufficient to produce gross income adequate for payment of the following in the order set forth:
 - (a) All installments of principal and interest on the Loan, and
 - (b) All expenses of operation, maintenance, and repair of facilities in the Project Area.
- E) The Borrower shall establish a Reserve Fund and shall deposit monthly an amount equal to Two Percent (2%) of Project Area Gross Revenues into the Reserve Fund.
- 1) Borrower shall set up an individual account in its bank, which shall be the Reserve Fund depository.
 - 2) The Borrower shall use deposited funds for extraordinary, non-routine maintenance, repair and/or dredging of the Project Area throughout the term of this Agreement.
 - 3) Borrower's use of the Reserve Fund shall be consistent with "Department of Boating and Waterways Marina Maintenance Standards and Guidelines."
 - 4) Borrower shall provide proof that it has established and is contributing monthly to the Reserve Fund account before any Loan funds will be disbursed.
 - 5) All expenditures from the Reserve Fund shall require prior written approval of the Department. Written approval may include, but not be limited to, e-mail approval

and may be obtained up to one year in advance. Invoices or other evidence of expenditures must accompany a request for Department approval.

- 6) Any interest accrued in the Reserve Fund shall be retained in the Reserve Fund.
 - 7) Any funds remaining in the Reserve Fund upon termination of this Agreement shall be returned to the Borrower: however, Borrower shall not be eligible for future Department funding unless and until an amount equal to the remaining funds is first expended toward improvement of the Project Area.
- F) The Borrower shall annually report (due to the Department by April 1) the following:
- 1) Amounts deposited into the Reserve Fund account,
 - 2) Amounts withdrawn from the Reserve Fund account,
 - 3) Monthly Project Area Gross Revenues,
 - 4) Uses of funds withdrawn from the Reserve Fund account,
 - 5) Brief assessment of the condition of the Project Area,
 - 6) Anticipated expenditures from the Reserve Fund account over the next five years,
 - 7) Reserve Fund bank records during the fiscal year; and
 - 8) Signed copies of annual financial statements including the following:
 - (a) Balance Sheet
 - (b) Income Statement
 - (c) Cash Flow Statement
 - (d) Federal Income Taxes

ARTICLE 13 - LIABILITY AND FIRE INSURANCE

- A) The Borrower shall insure the Project Area, with the Department named as an additional insured, to cover liability arising from the design, planning, construction, maintenance or operation of Project Area.
- B) The Borrower shall obtain fire and extended coverage insurance equal to at least Ninety Percent (90%) of the value of insurable structures within the Project Area.
- C) Copies of any policy or policies, including any new or renewal policy, shall be in a form satisfactory to the Department. Copies of such policy or policies shall be submitted to the Department at least Twenty (20) days prior to the effective date or dates thereof.
- D) Any policy or policies shall contain the following endorsement:

The State of California, its officers, employees and agents are hereby declared to be additional insureds under the terms of this policy, as to activities of both the Borrower

and the Department in respect to the Project, and this policy shall not be cancelled without Thirty (30) days prior written notice to the Department.

- E) Loss under any fire insurance policy shall be payable to the Department for deposit in an appropriate trust fund with the State of California. The proceeds may be paid to the Borrower upon the Borrower's application for the reconstruction of the destroyed facilities.
- F) The Department shall not be responsible for the payment of any premiums or assessments on Borrower's insurance policies.

ARTICLE 14 - INSTALLATION OF OTHER FACILITIES

- A) The Borrower may at its own expense place or cause to be placed within the Project Area any structure, alteration, and/or improvement in addition to those set forth and described in Exhibit B, provided that such facilities:
 - 1) Do not directly or indirectly reduce the service capabilities for the boating public called for in Exhibit B including the sanitary and parking facilities, and
 - 2) Have the prior written approval of the Department. Approval shall not be unreasonably withheld.
- B) The Department shall not be obligated to make or cause to be made any alteration, improvement, or repair to any facilities within the Project Area in addition to the original construction to the Project as provided for herein.

ARTICLE 15 - SIGN REFERRING TO DEPARTMENT FINANCING

The Borrower shall cause a permanent sign to be installed within the Project Area, which shall include a statement that the Department financed the Project. The sign shall be installed before the Project is made available to the public. The location and make-up of the sign, including the dimensions, materials and lettering, require the prior approval of the Department.

ARTICLE 16 - DIRECTIONAL SIGNS

The Borrower shall at the direction of the Department cause permanent directional signs to be installed that shall provide adequate directions for reaching the Project Area. The signs shall be installed on major roads in the area and in as close proximity as possible to freeway exits in conformance with the provisions of the City's Development Code and CalTrans policy. The locations and make-up of the signs, including the dimensions, materials, and lettering, require the prior approval of the Department.

ARTICLE 17 - WAIVER OF RIGHTS

It is the intention of the parties to this Agreement that from time to time either party may waive, in writing, certain rights under this Agreement. Any waiver by either party hereto of its rights with respect to a Default or any other matter arising in connection with this Agreement shall not be deemed to be a waiver with respect to any other Default or matter.

However, any forbearance by Department in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy. Any extension of time for payment of amounts due under the Agreement, granted by Department to Borrower, shall not operate as a waiver or release of Borrower's duties and obligations hereunder or under the loan documents.

ARTICLE 18 – NOTICES

The parties agree that to avoid unreasonable delay in the progress of the services performed hereunder; the Borrower and the Department shall each designate specific staff representatives for the purposes of communication between parties. Any notice or other written communication required or which may be given hereunder shall be deemed given when delivered personally, or if mailed, Three (3) days after the date of mailing; unless by express mail, facsimile (FAX) telecopy, e-mail, or telegraph, then upon the date of confirmed receipt to the following representatives:

For the Department:

Department of Boating and Waterways
Attention: *NAME*, Contract Administrator
2000 Evergreen Street, Suite 100
Sacramento, CA 95815
Telephone Number: (916) *NUMBER*
FAX Number: (916) 263-0648

For the Borrower:

BORROWER
Attention: *NAME, TITLE*
ADDRESS
Telephone Number:
FAX Number:

Either party hereto may, from time to time by notice in writing served upon the other as aforesaid, designate a different mailing address or a different or additional person to which all such notices or demands thereafter are to be addressed.

ARTICLE 19 - REMEDIES NOT EXCLUSIVE

The use by either the Department or the Borrower of any remedy specified in this Agreement for the enforcement of this Agreement is not exclusive and shall not deprive the party using such remedy of, or limit the application of, any other remedy provided by law.

ARTICLE 20 - OPINIONS AND DETERMINATIONS

Where the terms of this Agreement provide for action to be based upon the opinion, judgment, approval, review, or determination of either the Department or Borrower, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious or unreasonable.

ARTICLE 21 - SUCCESSORS AND ASSIGNS OBLIGATED

This Agreement and all of its provisions shall apply to and bind the successors and assigns of the parties hereto.

ARTICLE 22 - ASSIGNMENT

No assignment or transfer of this Agreement or any part hereof, rights hereunder, or interest herein by the Borrower shall be valid unless and until it is approved by the Department in writing. The Department's approval shall be granted at its sole discretion and may be made subject to such reasonable terms and conditions as the Department may impose.

ARTICLE 23 - LIABILITY

- A) The Borrower waives all claims and recourse against the Department including the right to contribution for any loss or damage arising from, growing out of, or any way connected with or incident to this Agreement.
- B) The Borrower agrees to indemnify, defend and save harmless, the Department, its officers, agents and employees from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers, and any other person, firm or corporation furnishing or supplying work services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by Borrower in the performance of this Agreement.
- C) If the Department is named as a co-defendant pursuant to Government Code section 895, et seq., the Borrower shall notify the Department and represent it unless the Department elects to represent itself. If the Department undertakes its own defense, it shall bear its own litigation costs, expenses and attorney's fees.

ARTICLE 24 - PRIOR TERMINATION

This Agreement shall terminate on the date specified under Article 6(A), if by such date (1) the Borrower has not met all conditions precedent to disbursement under this Agreement, or (2) the Department has disbursed no part of the Loan funds.

ARTICLE 25 – APPROVAL

This Agreement is of no force or effect until signed by both parties and approved by the Department of General Services. Borrower may not commence performance until such approval has been obtained.

ARTICLE 26 - AUDIT

Any contracts entered into by the Borrower involving an expenditure of Loan funds shall contain a provision that the Department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records for possible audit for a minimum of Three (3) years after final payment under such contract, unless a longer period of records retention is stipulated. Borrower agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. (Government Code section 8546.7, Public Contract Code section 10115 et seq., Title 2, California Administrative Code, section 1896).

ARTICLE 27 – RECYCLING CERTIFICATION

Upon the completion of performance under this Agreement, the Borrower shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of recycled content, both post consumer material and secondary material as defined in the Public Contract Code sections 12161 and 12200, in materials, goods, or supplies offered or products used in the performance of this Agreement, regardless of whether the product meets the required recycled product percentage as defined in the Public Contract Code sections 12161 and 12200. Borrower may certify that the product contains zero recycled content. (Public Contract Code sections 10233, 10308.5, 10354)

ARTICLE 28 – CERTIFICATION CLAUSES

The *CONTRACTOR CERTIFICATION CLAUSES* found at the following address: <http://www.documents.dgs.ca.gov/ols/ccc-103.doc> , as of the effective date of this Agreement, are hereby incorporated by reference and made a part of this Agreement.

ARTICLE 29 - CHILD SUPPORT COMPLIANCE ACT

- A) Borrower recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code.
- B) Borrower, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

ARTICLE 30 - UNENFORCEABLE PROVISION

In the event that any provision of this Agreement is unenforceable or held to be unenforceable, then the parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby.

ARTICLE 31- UNION ORGANIZING

For all contracts, except fixed price contracts of \$50,000 or less, the Borrower acknowledges that:

- A) Borrower will not assist, promote or deter union organizing by employees performing work on a state service contract, including a public works contract.
- B) No state funds received under this Agreement will be used to assist, promote or deter union organizing.
- C) Borrower will not, for any business conducted under this Agreement, use any state property to hold meetings with employees or supervisors, if the purpose of such meetings is to assist, promote or deter union organizing, unless the state property is equally available to the general public for holding meetings.
- D) If Borrower incurs costs, or makes expenditures to assist, promote or deter union organizing, Borrower will maintain records sufficient to show that no reimbursement from state funds has been sought for these costs, and that Borrower shall provide those records to the Attorney General upon request.

Borrower, by signing this Agreement, acknowledges the applicability of Government Code section 16645 through section 16649 to this Agreement.